

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DERRYL TYRONE FOSTER,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Civil No. 10cv1952 BTM (BLM)

**ORDER DENYING WITHOUT
PREJUDICE MOTION FOR
APPOINTMENT OF COUNSEL AND
DISMISSING CASE WITHOUT
PREJUDICE**

On September 15, 2010, Petitioner, a state prisoner proceeding pro se, filed a motion asking the Court to grant a stay and abeyance pursuant to *Rhines v. Webber*, 54 U.S. 269 (2005). By Order dated October 1, 2010, the Court denied Petitioner's request for stay and abeyance without prejudice. (See Order dated October 1, 2010 [doc. no. 2].) Petitioner was advised that the Court could not grant the request because he had not yet filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, and unless Petitioner is a capital prisoner, he had not initiated habeas proceedings in this Court. *Calderon (Nicolaus) v. United States District Court*, 98 F.3d 1102, 1107 n. 3 (9th Cir. 1996) (stating that “[u]nlike non-capital prisoners who initiate habeas proceedings by filing a petition for a writ of habeas corpus, capital prisoners commence federal habeas proceedings by filing a request for appointment of counsel”); *McFarland v. Scott*, 512 U.S. 849 (1994).

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1 On November 8, 2010, Petitioner filed a Motion to Appoint Counsel. [Doc. No. 4.]
2 Petitioner has not filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this
3 Court and has not alleged that he is a capital prisoner, therefore this Court lacks jurisdiction and
4 **DENIES** Petitioner's Motion for Appointment of Counsel as moot.

CONCLUSION

6 For the foregoing reasons, Petitioner's request for appointment of counsel is **DENIED**
7 as moot and the case is **DISMISSED** without prejudice and without leave to amend for the
8 reasons set forth in the Court's Order of October 1, 2010. If Petitioner's chooses to file a
9 subsequent petition for writ habeas corpus pursuant to 28 U.S.C. § 2254, it will be filed as a new
10 case and given a new case number.

11 || IT IS SO ORDERED.

12 || DATED: December 28, 2011

Benny Ted Markowitz

Honorable Barry Ted Moskowitz
United States District Judge